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in the Supreme Court of the United States

OCTOBER TERM 1972

NO. 72-1283

MR. BOSTON DISTILLER CORP. and CONSOLIDATED DISTRIBUTORS OF TAMPA, INC.,

Petitioners,

vs.

RICHARD A. PALLOT, JACK C. DEMETREE, NELSON A. ITALIANO, B. W. SIMPKINS, and J. H. BAROCO, as members of and constituting the BOARD OF BUSINESS REGULATION of the State of Florida,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
GROUNDS FOR JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	
POINT I	2, 3
POINT II	3
POINT III	3
STATEMENT OF THE CASE	3
STATUTORY AND CONSTITUTIONAL PROVISIONS	5
ARGUMENT	
POINT I	6-9
POINT II	9-13
POINT III	13-14
CONCLUSION	14-15
CERTIFICATE OF SERVICE	16

TABLE OF CASES

	Page
Elliott Advertising vs. Metropolitan Dade County, 422 F.2 1141 (5 Cir. 1970)	5, 9
England vs. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964)	7
Ex Parte Poresky, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933)	13

TABLE OF STATUTES

Title 28 USC, §1341	4, 5, 6
Title 28 USC, §1331(a)	6
Title 28 USC, 2254	9

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the Opinion and Judgment of that Court denying

their appeal from the dismissal of their Complaint in the United States District Court for the Northern District of Florida.

OPINIONS BELOW

The Petitioners' Complaint filed in the United States District Court for the Northern District of Florida, Tallahassee division, was dismissed *sua sponte* by that Court by Order dated May 22, 1972 and re-printed as appendix A hereto. Petitioners appealed the Order of Dismissal to the United States Court of Appeals for the Fifth Circuit. That Court transferred the case to the Summary Calendar and without oral argument affirmed by Opinion dated November 1, 1972, reported 469 F.2 337 and re-printed as appendix B hereto. A timely filed Petition for Rehearing was denied by an Order dated December 19, 1972, reported __ F.2 __ and re-printed as appendix C hereto.

GROUNDS FOR JURISDICTION

Jurisdiction in this Court is asserted under Title 28 USC, §1254(1). The Judgment sought to be reviewed was entered November 1, 1972, and rendered December 19, 1972, when the Petition for Rehearing was denied.

QUESTIONS PRESENTED FOR REVIEW

I

CAN THE ABSTENTION DOCTRINE BE APPLIED TO A CASE TO WHICH THE TAX INJUNCTION ACT, TITLE 28 USC, §1341

APPLIES TO DENY JURISDICTION IN A FEDERAL DISTRICT COURT TO PASS UPON FEDERAL CONSTITUTIONAL RIGHTS AFTER STATE COURTS HAVE DENIED RELIEF?

II

CAN THE DOCTRINE OF RES JUDICATA BE APPLIED TO A SUIT WHERE THE PARTIES IN THE SUIT ON THE BASIS OF WHICH RES JUDICATA IS ASSERTED ARE NOT IDENTICAL TO THE PARTIES IN THE SUIT AT BAR?

III

CAN A SINGLE JUDGE OF A UNITED STATES DISTRICT COURT REFUSE TO REQUEST THE CONVENTION OF A THREE JUDGE DISTRICT COURT WHERE THERE IS NO QUESTION BUT THAT THE ALLEGATIONS OF THE COMPLAINT RAISE A SUBSTANTIAL QUESTION OF CONSTITUTIONALITY?

STATEMENT OF THE CASE

Petitioners filed their Complaint in the United States District Court for the Northern District of Florida, Tallahassee division, seeking relief by way of injunction and declaratory decree against a Florida taxing statute. The Complaint, together with the Exhibits thereto is re-printed as appendix D hereto.

The Complaint asserts and demonstrates to a point of certainty that the Florida Taxing Statute involved in this case is blatantly arbitrary, discriminatory and violative of the equal protection and due process clauses and has cost over a quarter of a million dollars in taxes to Petitioners and particularly to the Petitioner, Mr. Boston Distiller Corp.

Petitioners were, of course, required to demonstrate jurisdiction in the United States District Court. Because they sought relief against a state taxing statute, they were required to show that the provisions of the Tax Injunction Act, Title 28 USC, §1341 did not apply to this case. That act provides as follows:

> "The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State Law where a plain, speedy and efficient remedy may be had in the courts of such state."

Petitioners met the statute by asserting that they had exhausted their State remedies through the highest court of the State of Florida, the Florida Supreme Court. In fact, the Circuit Court (or trial court in Florida) had declared the statute unconstitutional, but the Supreme Court of Florida reversed. Petitioners attached to their Complaint copies of the unreported Opinion of the Circuit Court and the Opinion of the Supreme Court of Florida reported at 245 So.2 240. Those Opinions are re-printed as Exhibits 1 and 2 to appendix D to this Petition.

The District Court dismissed the Complaint *sua sponte* by Order, appendix A hereto, asserting that the Absten-

tion Doctrine destroyed jurisdiction in the Federal District Court.

On appeal, the Fifth Circuit saw fit to transfer the case to the Summary Calendar and affirm, asserting *res judicata*. See appendix B hereto.

A timely filed Petition for Rehearing pointed out to that Court that res judicata is a doctrine that does not apply unless there is an identity of parties under that Court's own Opinion in *Elliott Advertising vs. Metropolitan Dade County*, 422 F.2 1141 (5th Cir. 1970). A laconic denial of the Petition followed (see appendix C hereto) and this Petition results.

STATUTORY AND CONSTITUTIONAL PROVISIONS

A. The Tax Injunction Act, 28 USC 1341, has previously been set out in the Statement of Facts.

B. Portions of Florida Statutes 561.46 and 561.463 are printed in their entirety in appendix D hereto.

C. Petitioners rely upon the provisions of the Constitution of the United States Amendment XIV, §1 which provides as follows:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT

I

CAN THE ABSTENTION DOCTRINE BE APPLIED TO A CASE TO WHICH THE TAX INJUNCTION ACT, TITLE 28 USC, §1341 APPLIES TO DENY JURISDICTION IN A FEDERAL DISTRICT COURT TO PASS UPON FEDERAL CONSTITUTIONAL RIGHTS AFTER STATE COURTS HAVE DENIED RELIEF?

This case presents a question which affects all litigation respecting the validity of State taxes under Federal Constitutional provisions. It is a question which has never been determined by this Court, or by any Court of Appeals prior to the decision to which this Petition is addressed.

These Petitioners questioned the constitutionality of a State taxing statute as it was applied to them.

Normally, the Petitioners would have a choice of jurisdiction between the Florida State Courts and the Federal District Court under the provisions of Title 28 USC, §1331 (a) giving the District Court original jurisdiction of civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the constitution, laws or treaties of the United States.

However, the jurisdiction of the District Court was limited by the Tax Injunction Act, §1341 of Title 28.

Since there was a remedy in the Courts of Florida which was concededly plain and speedy, Petitioners repaired to those Courts to seek relief. The Circuit Court of Florida granted relief; the Supreme Court of Florida denied relief and upheld the constitutionality of the statute.

At this point in time, the remedies in the State Courts were demonstrably not efficient.

The Petitioners then filed the instant suit in the Federal District Court and were told by the Federal District Judge in his Order dismissing the case for want of jurisdiction, that the Abstention Doctrine barred the suit.

The Abstention Doctrine is a judge made rule and is grounded on the premise that a party has voluntarily submitted his claims to the jurisdiction of the State Courts. Petitioners are unable to find a case where the Abstention Doctrine has been applied to a situation where there was not initial concurrent jurisdiction between State and Federal courts.

In *England vs. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L.Ed. 2d. 440 (1964) this court said:

> "The line drawn should be bright and clear, so that litigants shunted from Federal to State Courts by application of the Abstention Doctrine will not be exposed, not only to unusual expense and delay, but also to procedural traps operating to deprive them of their right to a District Court determination of their federal claims. It might

be argued that nothing short of what was done in Buttons should suffice—that a litigant should retain the right to return to the District Court unless he not only litigates his federal claims in the State Tribunals but seeks review of the State decision in this Court. But we see no reason why a party, after unreservedly litigating his federal claims in the State Courts *although not required to do so*, should be allowed to ignore the adverse State decision and start all over again in the District Court." [Emphasis added]

In the case at bar, it cannot be said that the Petitioners elected the State Forum, or that they voluntarily resorted to it. The Tax Injunction Act deprived the District Court of jurisdiction as long as there was the possibility of a State Court remedy. Unless and until they exhausted their State Court remedies, or were able to demonstrate that such remedies were non-existent, these Petitioners could not have brought an action in the District Court.

However, at the time the instant suit was filed, these Petitioners were able to demonstrate that the State Court remedy, while it may have been plain and speedy, was not efficient in their case. Although the statute in question is baldly and patently unconstitutional, they could get no relief therefrom through state agencies and courts.

In this case, jurisdiction in the Federal Court is not concurrent with that in the State Court; it is consecutive. It depends upon the Petitioners showing that there is no plain, speedy and efficient remedy in the State courts. This they have done to a point of demonstration.

This case and the construction of the Tax Injunction Act and its impact on the Abstention Doctrine can be analogized to Title 28 USC, §2254. Under that statute, a Petitioner seeking Federal Habeas Corpus is faced with precisely the same type of jurisdictional sequence. There, he must exhaust his state remedies before coming to the Federal Court.

In the instant case, Petitioners respectfully suggest that where Petitioners are left high and dry after exhausting their state remedies, they cannot be precluded by the application of a judge made Abstention Doctrine from gaining the federal relief to which they are entitled.

II

CAN THE DOCTRINE OF RES JUDICATA BE APPLIED TO A SUIT WHERE THE PARTIES IN THE SUIT ON THE BASIS OF WHICH RES JUDICATA IS ASSERTED ARE NOT IDENTICAL TO THE PARTIES IN THE SUIT AT BAR?

In the first place, *res judicata* is an affirmative defense; it is not a bar to jurisdiction. In the second place, in the case at bar, the doctrine of *res judicata* cannot apply since the parties Petitioner in this suit are Mr. Boston Distiller Corp. and Consolidated Distributors of Tampa, Inc., whereas the parties Plaintiff in the Florida suit were Mr. Boston Distiller Corp. and Hartley and Parker, Inc. The precise question of whether *res judicata* can exist in this case was discussed by the Fifth Circuit in its own case of *Elliott Advertising Co. vs. Metropolitan Dade*

County, 425 F.2 1141 (5th Cir. 1970) where that court refutes its own argument in this case in terms which this Petitioner cannot improve upon and which we therefore quote:

> "Under the doctrine of res judicata, a prior judgment on the merits rendered by a state court of competent jurisdiction operates as a bar to a subsequent adjudication of the same cause of action, in substance rather than form, between the same parties or their privies in federal court, not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action, regardless of whether questions of federal or state law are involved. Acree v. Air Line Pilots Association, 5 Cir. 1968, 390 F.2d 199, cert. den. 393 U.S. 852, 89 S. Ct. 88, 21 L. Ed. 2d 122; Hudson v. Lewis, 5 Cir. 1951, 188 F.2d 679; Iselin v. C. W. Hunter Co. 5 Cir. 1949, 173 F. 2d 388; Jarrad v. Southeastern Shipbuilding Corporation, 5 Cir. 1947, 163 F. 2d 960; Thompson v. Houston Oil Co., 5 Cir. 1930, 37 F. 2d 687, 28 USC. §1738 (1948). However, it is equally elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969); Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

Two of the named plaintiffs-appellants in the instant action, Outdoor Media, Inc., and Webster Outdoor Advertising, were in no way involved in the previous actions brought by Donnelly and Elliot to challenge Ordinance No. 63-26, either as named parties or as members of a class being represented, and therefore are not bound by these previous adjudications. Nor are any unnamed members of the class represented in this action (with possible minor exception), which includes all persons who are in the outdoor advertising business or who own or lease outdoor advertising facilities in Dade County, Florida, bound by the prior state actions.

Nor does this Court lack jurisdiction to decide the substantive issues presented by this appeal under the rule that a federal district court has no jurisdiction to directly review a final determination of federal constitutional questions, voluntarily submitted to and decided by state courts in state court litigation. Rooker v. Fidelity Trust Company, 263 U.S. 413, S.Ct. 149, 68 L. Ed. 362 (1923); Paul v. Dade County, Fla. 5 Cir. 1969, 419 F. 2d 10; Brown v. Chastain, 5 Cir. 1969, 416 F. 2d 1012; Dade County Classroom Teachers' Ass'n v. Nathan, 5 Cir. 1969, 413 F. 2d 1005; Hanna v. Home Insurance Company, 5 Cir. 1960, 281 F. 2d 298, cert. den. 365 U.S. 838, 81 S. Ct. 751, 5 L. Ed. 2d 747; Williams v. Tooke, 5 Cir. 1940, 108 F. 2d 758. Each of these cases, with the possible exception of Paul v. Dade County, supra, expressly involved an effort to have a federal district court act as an

appellate court and review or set aside a final state court judgment. Clearly that is not the situation here. What is sought here is a de novo adjudication of the constitutionality of a county ordinance which had been challenged by some, but not all, of the plaintiffs and upheld in prior state litigation. Merely because a federal district court is called to pass upon federal constitutional issues which have previously been passed upon by a state court does not mean that the federal district court is assuming appellate jurisdiction to review a prior state judgment, even where some of the plaintiffs before it were also parties in the prior state action and may be barred under the doctrine of res judicata. The parties in this action who are unaffected by the prior state decisions are entitled to a determination of their constitutional rights under the ordinance, and it is their option whether to invoke the jurisdiction of the federal courts or the state courts. The statement of this Court in Paul v. Dade County, supra, that "[a] federal district court is without jurisdiction to hear federal constitutional claims already litigated in state courts when, as here, there is already a final appealable judgment by a state court at the time the federal suit is instituted" must be read in the light of Rooker, supra, and the other cases it relied on.

Without determining the full extent to which Elliott and Donnelly are barred by their involvement in the prior state actions under the doctrine of res judicata and collateral estoppel, we hold that the remaining plaintiffs-appellants and the

class they represent are in no way barred from prosecuting this action and proceed to consider the substantive issues raised by this appeal."

Clearly, there could be no *res judicata* argument here, even if *res judicata* could apply to bar the assertion of these federal rights which we do not, for a moment, concede.

III

CAN A SINGLE JUDGE OF A UNITED STATES DISTRICT COURT REFUSE TO REQUEST THE CONVENTION OF A THREE JUDGE DISTRICT COURT WHERE THERE IS NO QUESTION BUT THAT THE ALLEGATIONS OF THE COMPLAINT RAISE A SUBSTANTIAL QUESTION OF CONSTITUTIONALITY?

Petitioners, in their Complaint, asked the District Judge to take the necessary steps to convene a three judge court to hear the case. In *ex parte Poresky*, 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152 (1933), this Court held that if the allegations of the Complaint raise a substantial question of constitutionality, then the District Judge must take the proper steps to convene a three judge court.

A reading of the lower court's Order of Dismissal and of the Opinion of the Court of Appeals indicate that the one aspect of the case not passed upon is the question of the substantiality of Petitioners constitutional attack. It is easy to understand this upon a reading of the Complaint. The questions raised are certainly substantial.

Petitioners earnestly contend that they are entitled to have a three judge court consider this matter and make such determination of the case as they will and that any aggrieved party is then entitled to take a direct appeal to this Court from that determination. That is what the law provides and that is what the Parties are entitled to.

CONCLUSION

It is clear that the Abstention Doctrine cannot bar Petitioners suit in this case. That judge made rule cannot be applied to a situation where jurisdiction in the Federal Court was non-existent at the time that Petitioners went to the State Court.

It is equally clear that Petitioners have demonstrated that they have no efficient remedy in the state system.

It is abundantly clear that res judicata cannot apply to bar this suit, and in any event, res judicata cannot be a jurisdictional issue in this cause.

It is also clear that the single judge District Court could not and should not have made the determination to dismiss this cause.

Congress meant to give the District Courts original jurisdiction of cases arising under the Constitution of the United States, and they also meant to have those cases determined by three judge Federal Courts.

For the convenience of the states and the administration of state taxation, Congress provided in the Tax Injunction Act that where a plain, speedy and efficient

remedy could be had in the state courts, the District Courts were not to interfere with schemes of state taxation. In the instant case, there is not only no efficient remedy in the state courts available to Petitioner, but a reading of the Complaint and the Florida Supreme Court Opinion will demonstrate beyond question that the Supreme Court of Florida simply ignored the contents of the Florida Taxing Statute, and the requirements of constitutional due process in reaching their conclusion.

Petitioners respectfully suggest that the issues raised in this case, affecting as they do the totality of claims of federal constitutional protection in state tax matters, should be heard and determined by this Court; and they respectfully point out that if this case is, in fact, heard by this Court, this will be the first Court in the federal system which has deigned to hear oral argument on this case of first impression.

A writ should be granted.

Respectfully submitted,

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By: _____
SHALLE STEPHEN FINE

CERTIFICATE OF SERVICE

I certify that a copy of this Petition for Certiorari was air mailed to Herbert Klein, Esq., attorney for the Respondents, Department of Business Regulation, The Carlton Building, Tallahassee, Florida, this day of March, 1973.

SHALLE STEPHEN FINE